a matter which could be said to "arise in" the bankruptcy and that such creditor has a clear right to proceed by way of action in the Chancery Division. His Lordship's judgment is too long for quotation but to my mind it amply covers the present case.

I am not concerned here with the question of whether the creditor should have proceeded by way of originating summons rather than by way of suit, or with the question of whether he is entitled to the remedy for which he asks, or, indeed, to any other remedy. These are questions which, if they arise, will have to be decided in the course of the civil suit. Nor am I concerned with the question of whether in all the circumstances of the case he would not be well advised to value his security and come in under the bankruptcy. What I am concerned with is the question of whether the creditor is entitled to proceed outside the bankruptcy and independently of it and for the reasons I have stated the answer to that question is undoubtedly in the affirmative. There will accordingly be no order on the Official Assignee's motion.

Before leaving the case, I feel I should say a word about section 18 of the Second Schedule to the Bankruptcy Enactment in view of the argument that that section has in some way a bearing on the present case. It has no such bearing. In the first place, its provisions are permissive and not mandatory and, in the second place, it only applies in the case of a charge of immoveable property whereas in the present case the security is a mortgage of a *chose in action*.

No order.

KESARMAL & ANOR. v. VALLIAPPA CHETTIAR & ANOR.

[O. C. J. (Wilson J.) June 18, 1954]

[K. L. — Civil Suit No. 108 of 1954]

Res judicata — Action to set aside previous judgment on ground of fraud, forgery and perjury.

This case arises out of another Civil Suit in which the present first defendant was the plaintiff and the two plaintiffs in this Suit were the defendants. Judgment was given for the plaintiff in that action and subsequently confirmed by the Privy Council [(1954) M.L.J. 119], by which it was held that the transfer of land from the plaintiff during the Japanese occupation was obtained by duress and that the defendants were parties to it or had knowledge of it. The defendants in that action now seek to set aside that judgment on the ground that it was obtained by means of fraud, forgery and perjury.

Held: the judgment in the previous Suit is *res judicata* and could only be set aside if fraud were proved, and the allegation of fraud could only succeed if it could be shown that this matter was not before the Court in the previous Suit or could not with reasonable diligence on the part of the present plaintiffs have been before the Court.

Held also: the plaintiffs cannot succeed in that action on their allegation of perjury alone.

Cases referred to:—

(1) *Kunjabehari Chakrabarty v. Krishnadhone Majumdar* A.I.R. 1940 Cal. 489.

(2) *Everett v. Ribbands* (1946) L.T. 143.

(3) *Charles Bright & Co. Ltd. v. Sellar* (1904) 1 K.B. 6.

NOTICE OF MOTION for an order to dismiss the Suit.

K. A. Seth (*K. Chelvanayagam* with him) for the plaintiffs.

Sir Roland Braddell (*Ng Ek Teong* with him) for the 1st defendant, 2nd defendant absent.

Cur. Adv. Vult.

Wilson J. : — This is a Notice of Motion by the first defendant for an order that the suit be dismissed upon the grounds: (1) that the action is frivolous and vexatious and is an abuse of the process of the Court; and (2) the plaint filed discloses no reasonable cause of action. The original plaint was against the first defendant only. Subsequently, a Notice of Motion was filed for leave to be granted with the consent of His Highness the Sultan of Selangor in Council to join the second defendant and to amend the plaint accordingly and in certain other aspects. The second defendant is not a party to this motion. The circumstances in which this action is brought are very fully set out in the amended statement of plaint. I do not propose to refer to the allegations in detail. If this motion should have to be considered by another Court, all the allegations contained in the amended plaint will be before that Court and that Court will have a full discretion to decide all the matters which have been argued before me at considerable length and will be unfettered by the conclusions to which I have come.

Paragraphs 1 and 2 of the amended plaint are merely formal. The case arises out of another Civil Suit No. 88 of 1950 in which the present first defendant was the plaintiff and the two plaintiffs in this suit were the defendants. The second defendant in this suit was not a party to the action although he gave evidence.

Paragraphs 3 to 18 of the amended plaint set out the circumstances leading up to Civil Suit No. 88 of 1950.

Paragraphs 19 to 23 set out what happened in the Suit. The claim of the plaintiff in that suit was that the instruments of transfer executed by the plaintiff in that suit in favour of the two defendants in respect of two pieces of land in the district of Klang should be set aside on the grounds that they were obtained with the knowledge of the defendants by coercion or duress during the Japanese occupation. The learned trial

Judge held that the transfer of the lands was obtained from the plaintiff by duress and the defendants were parties to it or had knowledge of it, and he gave judgment for the plaintiff. The case went before the Court of Appeal who upheld the judgment of the learned trial Judge. Subsequently, the case went to the Judicial Committee of the Privy Council who advised that the appeal should be dismissed, as it in fact was.

The defendants in that action, who are the plaintiffs in this action and who will hereafter be referred to as the plaintiffs, brought this action against the first defendant originally to set aside the judgment of the Court in Civil No. 88 of 1950 and in the meantime to restrain the first defendant from taking any steps to give effect to any part of the order made by the Court or to any part of the order made by the Court of Appeal or to any part of the order made by the honourable the Privy Council. The grounds for this suit are contained mostly in paragraph 24 of the amended plaint in which the plaintiffs allege that the first defendant obtained judgment in his favour in Civil Suit No. 88 of 1950 by means of fraud, forgery and perjury. I am satisfied that the judgment in Civil Suit No. 88 of 1950 is *res judicata* and could only be set aside if fraud were proved, and that the allegations of fraud could only succeed if it could be shown that this matter was not before the Court in the original suit or could not with reasonable diligence on the part of the plaintiffs have been before the Court.

Sir Roland Braddell has, I think, correctly pointed out that the Supreme Court Rules, 1932, Rule 1 sub-rule 33, is based on the English Order 25 Rule 4 with a material difference and that the Federal rule is or was the same as that pertaining in India, and therefore he has relied mainly on the question of perjury, to which I propose to address myself first on the Indian decisions.

In the case of *Kunjabehari Chakrabarty v. Krishnadhone Majumdar*[1], at p. 492, the Court has stated: "It is now well settled that a decree cannot be reopened on the ground that it has been obtained by perjured evidence." Having regard to other Indian cases which have been cited to me, both in Calcutta and in Bombay, Allahabad, Rangoon, Patna, Lahore, Madras and Oudh, to which I do not feel it is necessary to refer in detail, I think the position in India is clear.

So far as the law in England is concerned, I am not satisfied that it is any different if that is material. I have been referred to the case of *Everett v. Ribbands*[2]. In that case the Court of Appeal held that "it would be a disastrous thing if a plaintiff, having lost an action, the Judge having believed the statement of the defendant, could come to the Court again and bring another action, alleging only that the defendant had made a false statement and the Judge ought not to have believed him." It is true that it was stated that the Court did not intend to lay down as a proposition of law that under no circumstances could a judgment obtained as a result of perjury be set aside in a subsequent action. The Court did not indicate any circumstances in which it thought that a judgment could be upset on the grounds of perjury and the judgment is not very helpful to me on that point.

In this case I feel that I should in any event follow the judgments of the Indian Courts, and I am therefore satisfied that the plaintiffs cannot succeed in this action on their allegations of perjury alone.

It may be that they could allege and call evidence as to perjury if they were in a position to allege fraud arising out of forgery or otherwise independently of perjury.

In this case, they now allege that an entry in the then plaintiff's day book was a forgery. They have attached to the plaint what is alleged to be a photostat copy of a page in the first defendant's day book. It appears to me that the sole point for my consideration is whether it is now open to the plaintiffs to allege that that document was a forgery. In the case of *Charles Bright & Co. Ltd. v. Sellar*[3] at p. 12, Lord Cozens-Hardy L.J., stated :—

> "For instance where a judgment has been obtained by fraud, Birch v. Birch, (1902) p. 130, or where fresh material evidence has been obtained since the judgment which could not have been previously procured, Boswell v. Coaks, 6 R. 167, an action may be maintained. Actions of this nature do not invite the High Court to rehear upon the old materials. Fresh facts are brought forward, and the litigation may be well regarded as new and not appellate in its nature."

I understand this to mean that where evidence was procurable by a party to an action in a previous case he cannot rely on it on an appeal or a new plaint.

It is alleged, correctly, that the day book was not put in evidence in Civil Suit No. 88 of 1950. One item, however, included in it, the exhibit "N", now attached to the new plaint, was contained in a bundle of documents agreed between the solicitors of the plaintiff and the then defendants. The defendants had inspection of those documents but they say that they were only allowed to see one item in exhibit "N" and that was one of the items which is now alleged to have been forged. It must have been obvious to the defendants' solicitors that the item which they were allowed to see contained a figure of $1,000 which had clearly been altered to $5,000. One would have thought that would have put them on their guard. It is now

said that they had not had an opportunity of seeing the whole page of the day book which has been photographed and is now attached to the plaint as exhibit "N". I am at a loss to understand why the necessary steps were not taken to obtain inspection of the whole day book or, at any rate, other items in it which they now say are material. It seems to me that it cannot be said that material evidence has been obtained since the judgment which could not have been previously procured in the previous action.

I cannot find anything in the plaint which, if true, would substantiate a charge of fraud other than the allegations of forgery and perjury. In these circumstances, so far as the first defendant is concerned, the application must succeed and the suit must be dismissed with costs on the grounds put forward in the Notice of Motion.

The position of the second defendant I find somewhat difficult. It may be that the plaintiffs could not succeed against the second defendant without the first defendant being a party to the Suit and it is a little difficult to discover from the amended plaint what they are claiming against him if the plaintiffs cannot succeed against the first defendant. However that may be, although he entered an appearance after the plaint was amended, he has made no application for the plaint to be struck out as against him. He is, in fact, not a party to the present application. In these circumstances I feel that I cannot make any order in this case so far as he is concerned.

Order accordingly.

Solicitors: *K. Chelvanayagam; Braddell & Ramani.*

LEE CHING SENG v. PUBLIC PROSECUTOR.

[A. Cr. J. (Buhagiar J.) August 2, 1954]
[Ipoh — Criminal Appeal No. 63 of 1954]

Common Gaming Houses Ordinance, 1953, s. 4(1)(b) — Occupier permitting premises to be used as a common gaming house by others — Presumption under s. 19 — Entry "under the Ordinance" — Mischief of a common gaming house.

A gazetted Senior Police Officer under the Common Gaming Houses Ordinance acting on information received, together with two police constables, raided premises in Ipoh where the appellant was found together with eleven other persons. There were also found in the said premises documents relating to 100, 1,000, and 10,000 characters lotteries. There was no evidence that there was written information on oath as provided by s. 16 of the Common Gaming Houses Ordinance or that the entry and search was effected as a result of a search warrant issued as provided by s. 18(1) of the Ordinance or that in default of such warrant, any of the circumstances set out in paragraphs (a), (b), (c) and (d) of the same sub-section were fulfilled.

The learned Magistrate found the appellant guilty under s. 4(1)(b) of the Ordinance and sentenced him to 4 months rigorous imprisonment and fined him $4,000 or in default of payment thereof to undergo a further term of 4 months rigorous imprisonment.

Held on appeal: (1) the presumption under s. 19 of the Common Gaming Houses Ordinance can only arise when premises have been entered under the Ordinance; (2) the mere fact that there is no evidence of entry "under the Ordinance" does not prevent evidence of the finding of instruments or appliances of gaming found therein being given and a conviction being obtained — the absence of such evidence only prevents the presumption that a house is a common gaming house arising so that the onus of proving this by evidence remains on the prosecution; (3) the fact that "instruments and appliances for gaming" are found in a place is not sufficient by itself to make that place a common gaming house — it is only in the case specified in the Ordinance that is, where lottery tickets are for sale, sold or distributed that a place is to be deemed to be "used for the purpose of a public lottery" and thereby becomes a common gaming house.

Case referred to:—

(1) *Regina v. Tan Yok Lan & Ors.* 4 Ky. 668.

CRIMINAL APPEAL.

Lim Kheng Kooi for the appellant.

M. Garton (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Buhagiar J.: — The appellant was charged in the Ipoh Magistrate's Court that he on the 19th day of January, 1954, at about 5.15 p.m. at No. 1 Jacaranda Avenue, Pasir Puteh, Ipoh, being the occupier of the said premises, did allow same to be used as a common gaming house by others and that he had thereby committed an offence punishable under section 4(1)(b) of the Common Gaming Houses Ordinance, 1953 (No. 26 of 1953). He was found guilty of this offence and sentenced to 4 months rigorous imprisonment and ordered to pay a fine of $4,000 or in default of payment thereof to undergo a further term of 4 months rigorous imprisonment.

The facts briefly are these. On the 19th January, 1954, Police Inspector Goh Swee Cheang (who is gazetted as a Senior Police Officer under the Common Gaming Houses Ordinance, 1953) acting on information received, together with two police constables, raided at about 5.15 p.m. premises at No. 1 Jacaranda Avenue, Pasir Puteh, Ipoh. The appellant was found in the said premises together with eleven other persons. There were also found in the said premises, *inter alia*, documents relating to 100, 1,000 and 10,000 characters lotteries. There is no evidence that there was written information on oath as provided by section 16 of the Common Gaming Houses Ordinance, 1953, or that the entry and search was effected as a result of a search warrant issued as provided by section 18(1) of the said Ordinance or that, in default of such warrant, any of the circumstances set out in paragraphs (a),